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No.

IN THE

Supreme Court of the United States

October Term 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED FOR REVIEW

Whether ERISA preempts and prohibits a third-party claim in a state court action for contribution and indemnity against trustees of any employee benefit plan for their breaches of duty?

PARTIES

Plaintiffs are Retail Shoe Health Commission, and Jack Maltz, Alfred Wachtel, Jules Arronson and Melvin Krauss, as Trustees of Retail Shoe Health Commission.

Defendants and Third-Party Plaintiffs are Charles G. Reminick, Herbert M. Britton, Bernard Spear, and Peter Blitzer, individually and doing business as Reminick, Aarons & Company.

Third-Party Defendants are Jack Maltz, Alfred Wachtel, Jules Arronson, Melvin Krauss and Joseph Binenbaum, and Tolley International Corporation, and The Estate of Harold Jacobson and Basil Castovinci Associates, Inc.

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No.

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

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JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioners Charles G. Reminick, Herbert M. Britton, Bernard Spear and Peter Blitzer, individually and doing business as Reminick Aarons & Company (hereinafter referred to as "Reminick, Aarons") respectfully pray that a writ of certiorari issue to review the decision and order of the Court of Appeals of the State of New York which held that the Employee Retirement Security Act of 1974 ("ERISA") preempted the jurisdiction of the state courts to adjudicate claims for contribution and indemnity.

OPINIONS BELOW

The opinions of the New York Supreme Court, County of New York, Appellate Division, First Department, and the Court of

Appeals are as yet unreported. Copies of these opinions are appended hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

ERISA § 502(e), 29 U.S.C. § 1132(e), provides in part:

> "(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

ERISA § 502(a), 29 U.S.C. § 1132(a), provides in part:

> "Persons empowered to bring a civil action.
>
> (a) A civil action may be brought —
>
> (1) by a participant or beneficiary-
>
> (A) for the relief provided in subsection (c) of this section or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan;
>
> (2) by the Secretary or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title . . . "

ERISA § 514(a), 29 U.S.C. § 1144(a), provides in part:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

New York's Civil Practice Law and Rules ("CPLR") Article 14 provides in part:

"§ 1401. Claim for Contribution

Except as provided in Section 15-108 of the general obligations law, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered when contribution is sought.

§ 1402. Amount of Contribution

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable share shall be determined in accordance with the relative liability of each person liable for contribution.

§ 1403. How Contribution Claimed

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action."

New York's CPLR Article 14-A provides:

§ 1411. Damages recoverable when contributory negligence or assumption of risk is established

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

§ 1412. Burden of pleadings; burden of proof

Culpable conduct claimed in diminution of damages, in accordance with section fourteen hundred eleven, shall be an affirmative defense to be pleaded and proved by the party asserting the defense.

§ 1413. Applicability

This article shall apply to all causes of action accruing on or about after September first, nineteen hundred seventy-five.

STATEMENT OF THE CASE

This is an action arising out of an alleged embezzlement of approximately $675,000 from the Plaintiff Retail Shoe Health Commission ("Retail Shoe") by its former administrator, Jerome Simon. Retail Shoe's Complaint alleged that it was a collectively bargained, multi-employer, jointly administered welfare fund (the "Fund") organized under the Labor and Managements Relations Act of 1947. The co-Plaintiffs Jack Maltz, Alfred Wachtel, Jules Arronson and Melvin Krauss sued as Trustees of the Fund.

The Petitioners Charles G. Reminick, Herbert M. Britton Bernard Spear and Peter Blitzer doing business as Reminick, Aarons is a firm of certified public accountants which were employed by the Fund. The main Complaint alleged that during the period 1972 to 1980 Reminick, Aarons was negligent by failing to discover the dishonest acts of Simon. Simon was alleged to have defalcated monies from the Fund by making bogus claims.

Petitioner Reminick answered the Complaint denying the allegations thereof and asserted several affirmative defenses including the following:

> "If any damages have been sustained by the Plaintiffs, which damages are expressly denied, then all such damages will have been caused and/or brought about in whole or material part, by the affirmative wrongdoing, fault, breach of fiduciary obligation, poor business judgment, negligence, failure of due care, and other wrongdoing of the Plaintiffs without similar acts of the Defendants contributing thereto, and, as a consequence of the foregoing the Complaint should be dismissed in all respects and/or any proven damages be proportionately reduced to the extent of Plaintiffs' contributing fault."

The Trustees of the Fund had a duty as fiduciaries to monitor the Fund and the activities of its Administrator Simon. Similarly, other professionals, including the Fund's actuaries Tolley International Corp. ("Tolley") and Basil Castovinci Associates, Inc. ("Castovinci") were hired to monitor the Fund and its Administrator. The actuaries were retained by Retail Shoe to administer the claims for benefits submitted by the Fund's beneficiaries and to insure that the proper benefits were paid.

Petitioner Reminick Aarons instituted, pursuant to CPLR Article 14, a Third-Party Complaint seeking contribution from the Trustees, a former Trustee, Joseph Binenbaum, and actuaries Tolley and Castrovinci. The Third-Party Complaint alleged that the losses and damages of Retail Shoe were caused and brought about in whole or material part, by the Trustees' acts of omission and/or commission in permitting and continuing, participating in and/or acquiescing to any proven embezzlements by the Fund's Administrator Simon.The Third-Party Complaint alleged that the Trustees, Tolley and Castovinci had all or part of the responsibility for uncovering and/or reporting the illegal acts. And for that reason Petitioner Reminick Aarons demanded judgment over and against them both by way of contribution and/or indemnity to the extent of each party's proportionate and participating fault and culpability.

The Trustees moved to dismiss the Third-Party Complaint on the basis that the state Court lacked jurisdiction to adjudicate the Petitioner's claims for contribution because those claims were preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a) and that the State Court lacked jurisdiction under § 502(e) of ERISA, 29 U.S.C. § 1132(e).

The Supreme Court of the State of New York denied the Trustees' Motion to dismiss the Third-Party Complaint holding that the statutory right of contribution and/or indemnity was "a vital state interest" and was only "tangential" to the regulatory objectives of ERISA. The court reasoned that the Petitioners' claims for contribution and/or indemnity were not subject to federal preemption under ERISA and that the New York Supreme Court did have subject matter jurisdiction to adjudicate the CPLR Article 14 contribution and indemnity claims.

The New York Appellate Division, First Department, affirmed the Supreme Court in all respects, but granted leave to Appeal to the New York Court of Appeals.

The New York Court of Appeals in an erroneous four to three split decision reversed. The Court of Appeals held that the Petitioners' claims for contribution were preempted by ERISA and that the state courts lacked jurisdiction over the subject matter of the contribution claims.

The Court of Appeals decision stated in part:

> "The preemptive provisions of ERISA govern the judicial determination of breach of fiduciary duty claims against the trustees of an employee welfare benefit plan within the embrace of that Act and preclude actions in state court for enforcement of such claims. Accordingly, where such a plan has brought an action in our State courts against its accountants and consultants for their alleged failure to detect and report substantial misappropriations by the administrator of the plan, our courts are foreclosed from entertaining claims over by the accountants and consultants against the individual trustees of the plan for contribution or indemnity based on allegations that breach of their fiduciary duties by the trustees contributed to the losses sustained by the plan."

* * *

As a matter of substantive law, the nature and scope of the duties and liabilities of the trustees in this regard are determinable under the provisions of ERISA (e.g. ERISA ¶ 404, 405, 409; 29 U.S.C. ¶ 1104, 1105, 1109)

The question then arises as to whether those claims may be asserted in a state court action such as the present. Here again, it is the provisions of ERISA which are determinative. Subdivision (e) of section 502 of ERISA (29 U.S.C. ¶ 1132[e]) provided that the district courts of the United States shall have exclusive jurisdiction over civil actions arising under ERISA (with an exception not now pertinent). Accordingly, we are obliged to conclude that the present claims asserted by Reminick and Tolley against the trustees may not be entertained in our State courts.

* * *

If there is a deficiency or inequity in the scope of section 502(a), it is attributable to the Act itself and any petition for remedy or correction must be addressed to the Congress."

The dissenting opinion of Judge Judith Kaye joined in by Chief Judge Cooke and Judge Wachtler pointed out.

"... the result reached by the Court allows the trustees to escape responsibility for losses due in whole or part to their own derelictions, and leaves respondents with a potential massive liability and no effective remedy against plaintiffs who are also wrongdoers. I do not believe that ERISA requires this unpalatable result, and therefore would affirm the order below.

* * *

A pivotal assumption underlying the majority's holding is that respondents' (Petitioner's) claims are barred because they are not within the classes of persons authorized to bring a civil action under ERISA. But a claim for relief is not necessarily preempted or extinguished because the initiating party falls outside the enumerated categories of

¶ 1132(a). (See *Franchise Tax Bd* v. *Construction Laborers Vacation Trust,* U.S. , 103 S Ct 2841.)

> Nor is the provision for exclusive federal jurisdiction a bar to entertaining respondent's claims. First, that provision applies, by its own terms, only to actions brought by the enumerated persons which do not include respondents. Second, it is well established that even where statutes preempt state law and provide for exclusive federal jurisdiction state courts may, applying federal law, decide issues necessary to the resolution of the action (*Hathorn* v. Lovorn, 457 U.S. 255, 266 & n.18; *Pan Am. Co.* v. *Superior Court*, 366 U.S. 656, 664-65). Though the exclusive jurisdiction provisions of ERISA might prohibit the commencement of a state court action seeking affirmative relief against the trustees for their derelictions as trustees, it still would not prevent the state court from considering such questions when they are part and parcel of defenses to a cause of action premised on state law. (See, e.g. *Weiner* v. *Shearson*, 521 F.2d 817; *Shareholder Mgmt Co.* v. *Gregory*, 449 F.2d 326; *Birenbaum* v. *Bache & Co.*, 555 S.W.2d 513 [Tex. App.]). The same rationale should apply here. Sustaining respondents' claims against the trustees would not alter substantive rights created by ERISA or disturb any allocation of responsibility among employers subject to ERISA (*Michota* v. *Anheuser - Busch, Inc.* Nos. 76-193, 77-2543 [D.N.J. decided October 7, 1983, unpublished opinion]) but would simply allow respondents to maintain apportionment claims in one action, as is common in tort cases in the state courts."

It is respectfully urged that the New York Court of Appeals erred in its interpretation of ERISA and that the Court's holding is contrary to and does violence to the letter, purpose and intent of ERISA. The purpose of ERISA is to hold trustees responsible for derelictions of their duties. And the Court of Appeals decision does great violence to that purpose by allowing "the trustees to escape responsibility for losses due in whole or in part to their own derelictions."

REASONS RELIED ON FOR ISSUANCE OF THE WRIT

1. THE DECISION OF THE NEW YORK COURT OF APPEALS INTERPRETING ERISA DEFEATS THE PURPOSE AND INTENT OF ERISA AND DOES VIOLENCE TO THE COMPREHENSIVE PROGRAM TO PROTECT EMPLOYEE BENEFITS FROM IMPROPER ACTS OF EMPLOYERS AND/OR TRUSTEES.

ERISA's preemption provision ¶ 514(a), 29 U.S.C. 1144(a), is based on the Supremacy Clause of the Federal Constitution. U.S. Const. Art. VI, c. 2; *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 315, 327 (1819); *DeCanas* v. *Bica*, 424 U.S. 351, 357-58 n.5 (1976); *Free* v. *Bland*, 369 U.S. 663, 666 (1962). The purpose of the Supremacy Clause is to insure that Federal laws will have national application and force in any conflict with state laws. *Mayo* v. *United States*, 319 U.S. 441, 445 (1943).

In determining whether a federal statute preempts a state law:

> "It will not be presumed that a federal statue was intended to supercede the exercise of the power of the State unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly presumed."

New York State Dept. of Soc. Serv. v. *Dublino*, 413 U.S. 405, 413 (1973) (quoting from *Schwartz* v. *Texas*, 344 U.S. 199, 202-403 (1952))

> "... [I]nflexible application of the (preemption) doctrine is to be avoided especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the Federal regulatory scheme."[1]

[1] State laws which do not clash with ERISA have been widely held not to be preempted by ERISA. Thus, state community property and support decrees affecting the distribution of pension benefits and exercise of fiduciary duties have been upheld against claims of federal preemption by ERISA. *Carpenters Pension Trust Fund N. Cal.* v. *Campa*, 444 U.S. 1028 (1980), (*dismissing appeal from*, 89 Cal. App. 3d 113, (Ct. Appl. Cal. 1st App. Dist.) *AT&T* v. *Merry*, 592 F.2d 118 (2d Cir. 1979); *Cody* v. *Riecker*, 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd* 594 F.2d 314 (2d Cir. 1979); *Stone* v. *Stone*, 450 F. Supp. 919 (N.D. Cal.

Farmer v. *United Brotherhood of Carpenters*, 430 U.S. 290,302 (1977) (union official's claim for intentional infliction of emotional distress against union not preempted by National Labor Relations Act); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) (federal courts do not have exclusive jurisdiction over personal injury and indemnity cases under the Outer Continental Shelf Lands Act ("OCSLA")). In *Gulf Offshore Co.* the Supreme Court summarized the principles governing state court jurisdiction to decide federal issues. In every case there is a presumption that state courts enjoy concurrent jurisdiction over those claims *Id.*, at 478. Only an explicit statutory directive, an unmistakable implication from legislative history or a clear

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1978), *aff'd* 632 F.2d 740 (9th Cir. 1980), *cert den.*, 453 U.S. 922 (1981); *Operating Engineers* v. *Zambersky*, 650 F.2d 196 (2d Cir. 1981) *Pardee* v. *Operating Engineers Pension Trust*, 408 F. Supp. 666 (C.D. Cal. 1976); *Clark* v. *Geraci*, 93 Misc. 2d 206, 402 N.Y.S.2d 929 (Sup. Ct. 1978). Similarly ERISA has been held not to preempt fair employment laws prohibiting discrimination in employment by requiring that pregnancy benefits be paid by employee welfare benefits plans. *Delta Airline* v. *Kramarsky*, 650 F.2d 1287 (2d Cir. 1981) *Gast* v. *Oregon*, 36 Ore. App. 441, 585 P.2d 12 (Ore. Ct. App. (1978); *Time Ins. Co.* v. *Dept. of Industry*, Labor Empl. Prac. Cas. (BNA) 391 (Wis. Cir. Ct. 1978). Likewise, ERISA does not exempt a debtor's pension benefits from New York's CPLR provisions governing enforcement of money judgments. *NBNA* v. *Electrical Workers Local* Union 3 Pension and Vacation Funds, 69 App. Div. 2d 679, 419 N.Y.S.2d 127 (2d Dept 1979), *app. dis.*, 48 N.Y.2d 752. *AT&T* v. *Merry*, 592 F.2d 118 (2d 1979). *See also, Hotel & Restaurant Employees & Bartenders Int. Union Local 54* v. *Danzinger*, 536 F. Supp. 317 (D.N.J. 1982) (New Jersey's Casino Control Act not preempted by ERISA). *Employee Savings Plan of Mobil Oil Corp.* v. *Geen*, 535 F.Supp 105 (S.D.N.Y. 1982); *Providence* v. *Valley Clerks Trust Fund*, 509 F. Supp. 388, 391 (E.D. Cal. 1981); *Cornell Manuf. Co.* v. *Mushlin* 70 App. Div. 2d 123, 420 N.Y.S.2d 231 (2d Dept. 1979) (action for waste of corporate assets by excessive payments into a pension plan not preempted by ERISA. As the Court in *Providence* v. *Valley Clerks Trust Fund, supra*, found:

> "(I)t now seems settled that where the state law has only an indirect effect on the plan and where it is one of general application which pertains to an area of important state concern, the court should find there has been no preemption."

Minn. Mining & Manuf. v. *Minnesota*, 444 U.S. 1041 (1980), *dismissing app. from*, 289 N.W. 2d 296 (Sup Ct. Minn. 1979) (State antidiscrimination law not preempted).

incompatibility between state court jurisdiction and federal interests will rebut the presumption. Even a finding of exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally. *Id.*, at 483 n. 12; *Hathorn* v. *Lovorn*, 457 U.S. 255, 102 S. Ct. 2421, 2428-29 & n. 18 (1982).

As Justice Frankfurter stated in *Pan Am Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 664 (1961):

> "Exclusive jurisdiction is given the federal courts but it is exclusive only for suits that may be brought in federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded."

W. Kilberg and C. Heron, "*The Preemption of State Law Under ERISA*, Duke Law J. 383, 391 (April, 1979) stated:

> ". . . (There is) no doubt that Congress intended to preserve some applications of state law in areas that are traditionally subjects of State action - insurance, banking, securities, workmen's compensation, disability and unemployment programs. It fell to the courts to apply this mixed intent to the enormous variety of employee benefits plans and the myriad of state laws that relate to them in a host of different ways. In carrying out their responsibility the courts must apply congressional intent with due regard for the sometimes exclusive standards of federal supremacy."

In *Franchise Tax Board* v. *Const. Laborers Vac. Trust*, ____ U.S. ____, 103 S. Ct. 2841, 2854-55 (1983) the Supreme Court held that ERISA 502(a) (the civil enforcement provision) "does not purport to reach every question relating to plans covered by ERISA." The Supreme Court further held that ERISA 514 (the preemption provision) "makes clear that Congress did not intend to preempt every state cause of action relating to such plans." Thus, ERISA 514 explicitly excepts from preemption state laws which regulate insurance, banking or securities and criminal laws of general application. Furthermore, ERISA explicitly permits state courts to decide actions relating to breaches of fiduciary

duties under ERISA brought by a plan beneficiary under ERISA 502(a)(1)(B),(e).

ERISA also implicitly makes clear that third-parties can raise claims relating to breaches of fiduciary duties in state courts.

ERISA § 412, 29 U.S.C. § 1112 requires that all fiduciaries be bonded, i.e. there must be breach of fiduciary duty liability or fidelity insurance in place. ERISA § 410, 29 U.S.C. § 1110 provides that a plan may purchase insurance for its fiduciaries or itself to cover liability occurring by reason of an act or omission of a fiduciary, if, and only if, the insurance is with recourse by the insurer against the fiduciary in the case of a breach of fiduciary duties. These suits would be brought in state court as no federal jurisdiction was conferred by ERISA over suits by subrogated insurers. The reason why ERISA requires that insurance bought by plans must be with recourse is that Congress did not want plans and their beneficiaries to pay higher premiums for insurance without recourse. In other words, Congress did not want the expense of fiduciary defalcations to fall upon plans and their beneficiaries. As Senator Javits explained:

> "The conferees decided to include a provision permitting either the employer, the union, the plan or the trustee himself to purchase insurance covering the personal liability of a trustee in the event of a trustee's breach of fiduciary responsibility. However, the conferees qualified the purchase of such insurance by the plan by requiring that the insurance policy permit recourse against the trustee by the carrier in the event of a claim involving a breach by the trustee. The purpose of this qualification is to spare the plan-and its participants and beneficiaries-the expense of exorbitant premiums in the absence of recourse provisions. There is no justification whatsoever for plan participants and beneficiaries having to shoulder the burden of subsidizing breaches of fiduciary responsibility committed by their trustees.
>
> Some concern has been expressed that this provision might inhibit employer or union representatives from serving as trustees. However, similar provisions have existed under the bonding requirements of the Welfare and Pension

> Plans Disclosure Act since 1962 without any adverse effect. In any event, it is highly doubtful that a person unwilling to accept full fiduciary responsibility should serve in positions of trust and, quite obviously, nonrecourse policies of insurance can be purchased by the employer or union involved without shifting the economic burden to the participants and beneficiaries."

HR2, 93rd Cong. 2d Sess., 120Cong. Rec. 22, 1974. Senator Javits was a leading proponent of pension legislation over many years, a co-sponsor of ERISA and the ranking minority member of the Senate Committee on Labor and Public Welfare. As such his statements are most influential in determining congressional intent. *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 637 (1973); HR2, 93rd Cong. 2d Sess. 120 Cong. Rec. 29,1934 (1974).

That an insurer, under ERISA can sue a fiduciary for breaches of fiduciary duties is unmistakable proof that suits alleging breaches of fiduciary duty by persons other that those listed in the civil enforcement statute, ERISA § 502(a), 29 U.S.C. 1132(a), are not preempted by ERISA § 514(a), 29 U.S.C. 1114(a) and that state courts retain jurisdiction over such suits. Indeed the instant action is an example of an action by a subrogated insurer.

Furthermore, a claim of contribution, such as the Petitioners raise here, is founded on the theory of subrogation. *Rouley* v. *State Farm Mutual Auto Ins. Co.*, 235 F.Supp 786 (D. La. 1964). Subrogation is the same theory behind insurance with recourse which Congress provided for in § ERISA 410, 29 U.S.C. 1110. A claim for contribution is a derivative right and not a new cause of action. *Rowe* v. *John C. Mottler Printing Press Co.*, 273 F.Supp. 363 (D.R.I. 1967). No independent subject matter jurisdiction is required for a contribution claim. A contribution claim may be premised on ancillary jurisdiction.

The purpose of ERISA is to protect the "continued well-being and security of millions of employees and their dependents" 29 U.S.C. § 1001(a).

ERISA § 2(b), 29 U.S.C.1002(b) provides:

> "It is hereby declared to be the policy of this Act to protect interstate commerce and the interest of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans and by *providing appropriate remedies*, sanctions and ready access to the Federal Courts. (emphasis supplied).

The purpose behind New York's contribution statute is the advancement of a strong public policy to hold a co-tortfeasor responsible for his proportionate share of Plaintiff's injuries. *Ackerman* v. *Southern Wood Piedmont Co.*, 409 F.Supp. 469, 472 (E.D.N.Y. 1976); *Raymond* v. *Ormsby*, 54 App. Div.2d 1021, 388 N.Y.S. 2d 365 (3d Dept. 1976). Another purpose of the contribution statute is judicial economy and the avoidance of inconsistent verdicts. *Meckley* v. *Hertz Corp.*, 88 Misc.2d 605, 608-609, 388 N.Y.S.2d 555, 557 (Sup. Ct. N.Y. Co. 1976); *Zillman* v. *Meadowbrook Hospital Co.*, 73 Misc.2d 726, 729, 358 N.Y.S.2d 466 (2d Dept. 1974), *rev'd* on *other grounds* 45 App. Div.2d 267 (2nd Dept. 1974); *Stein* v. *Whitehead*, 40 App. Div.2d 89, 337 N.Y.S.2d 821 (2d Dept. 1972); McKinney's CPLR § 3019 *Prac. Com.* § 3019:37 at 238-39.

The philosophy behind allowance of contribution between tortfeasors is that the discharge of an obligation by one of the obligors without proportionate payment from the other gives the latter an advantage to which he is not equitably entitled. *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Cokas* v. *Perkins*, 252 F. Supp. 563 (D.D.C. 1966); *see, also, Cooper Stevedoring Co, Inc.* v. *Kopke*, 417 U.S. 106, 115 (1974) (contribution rests on a finding of concurrent fault).

The traditional American rule that there was no right of contribution among joint tortfeasors was based on a misreading of the English case of *Merryweather* v. *Nixan*. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 n. 10, 16, 17 (1981). Most states have abrogated this rule and (t)he federal courts have come to realize that the policy considerations upon which

the traditional rule was built are archaic and lead to inequities." *Id.*

It is now generally recognized that:

> " . . . (I)t is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability."

Northwest Airlines Inc., Id. at 88 & n.19.

Permitting contribution among joint tortfeasers is not only consistent with, but furthers an important purpose of federal statutes such as ERISA, i.e., deterrence from wrongful conduct. *Stratton Group* v. *Sprayregen*, 466 F. Supp. 1180 (S.D.N.Y. 1979); *see, also, Sirota* v. *Solitron Devices*, 673 F.2d 566 (2d Cir. 1982), *cert. den.*, _____ U.S. _____, 103 S. Ct. 86 (1983) (accountants entitled to contribution from officers, directors and company where officers, directors and company all participated in defrauding purchasers of the company's stock.)

The New York Court of Appeals, however, interpreted ERISA to allow the trustees to "escape responsibility" for "their own dereliction." The New York Court of Appeals has provided wrongdoing trustees and fiduciaries with a way to avoid the strictures of ERISA by suing in state court where the trustees violations of their fiduciary duties cannot be questioned. Thus, the decision of the New York Court of Appeals is contrary to the purpose and intent of ERISA and must not be permitted to stand.

In this regard, the legislative history of ERISA discloses that one of the chief procedural weaknesses with the Welfare and Pension Disclosure Act of 1958 was that it relied upon the initiative of the individual employee to police the management of his plan. H. Rep. No. 533 93rd Cong. 1st Sess. 3 *et seq.* (1973). Thus, individual Fund member cannot be expected to sue the Trustees for dereliction of their duties. Experience has shown that contribution statutes are an effective way of bringing wrongdoers before the Courts. *Northwest Airlines, Inc, supra.*

Prior to the enactment of ERISA, the House Labor sub-committee held numerous hearing in Washington and at various cities

around the country. Again and again the subcommittee found benefits programs which favored a few, self dealing by plan administrators trustees and/or employers, and employees who had worked for decades only to be denied in their old age the benefits they had worked for. In almost every case the victim was the poor employee. In almost every case the perpetrator was the person responsible for managing the employee benefits. H. Rep. No. 533 93rd Cong. 1st Sess. (1973). To combat this problem, ERISA established non delegable duties for fiduciaries and civil and criminal sanctions for violations. And ERISA made a federal forum available for redress of wrongs.

Based on disclosure of malfeasance and improper activities by pension administrators, trustees, or fiduciaries, the Welfare and Pensions Disclosure Act was amended in 1961 to designate theft, embezzlement and bribery as federal crimes when they occurred in connection with welfare and pension plans. H. Rep. No. 533 93rd Cong. 1st Sess. 3 (1973)

Indeed Congress, after a prior comprehensive review of abuses in the administration and investment of private pension funds, adopted the Welfare and Pension Plan Disclosure Act in 1958. H. Rep. No. 533 93rd Cong. 1st Sess. 4 (1973).

However, after a decade of experience Congress found that the "chief procedural weakness (of the Welfare and Pension Plan Disclosure Act) can be found in its reliance upon the initiative of the individual employee to police the management of his plan." H. Rep. 533 93rd Cong. 1st Sess. 4 (1973).

The House Committee on Education and Labor's Report on the Employee Benefit Security Act of 1973, H. Rep. 533 93rd Cong. 1st Sess. 7 (1973) stated:

> "C. *Fiduciary Responsibility And Disclosure.*"
>
> Another area of concern of the Subcommittee has involved the conduct, administration and operations of pension plans. Of particular concern has been the course of conduct in fund transactions, the degree of responsibility required of fiduciaries, the types of persons who can be deemed pension "fiduciaries", and the

standards of accounting they shall be governed by in the management and disposition of pension funds."

The House Committee Found:

"At the time, the safeguarding effect of the fiduciary responsibility will operate efficiently only if fiduciaries are aware that the scope of their dealings will be open to inspection;

* * *

"The fiduciary responsibility section, in essence, codifies and makes applicable to fiduciaries certain principles developed in the evolution of the law of trust. Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purpose of employee benefit plans intended to be effectuated by the Act.

* * *

The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

* * *

The enforcement provisions have been designated specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redress or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies both in state and federal courts and to remove jurisdiction and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of investments"

* * *

. . . (S)tate law is preempted . . . the Committee believes it essential to provide for a uniform source of law . . . for

> evaluation of fiduciary conduct . . . As indicated previously, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired.

The Senate Subcommittee on Labor of the Sentate Committee on Labor and Public Welfare in 1971 conducted an extensive investigation of employee benefit abuses. Among other instances of abuses which were investigated were abuses in the retail shoe industry in the New York area, the very subject matter of the instant case. Among other witnesses to testify was Murray Finkelstein, a New York shoe salesman, who protested that the Retirement Fund of the Retail Shoe Employees denied him a pension despite almost twenty years of employment. The Subcommittee's report made extensive reference to Finkelstein's plight. S. Rep. No. 634 92nd Cong. 2d Sess. 69, 73, 82, 83 (1971).

Then Secretary of Labor George P. Shultz testified before the House Subcommittee on General Labor in April of 1970 and offered among other examples of fiduciary abuses in the retail shoe industry:

> "He observed that as to one fund, four or five employers appointed trustees borrowed from the Fund and one trustee owed over $62,000 having made no principal or interest payments for more than a year. In another instance, five officers of a corporation, who were the trustees of their pension plan, formed other corporations to retail shoes. The money to finance their outside activities was obtained by loans of up to $460,000 from the pension plan assets to finance their own private ventures.

S. Rep. No. 634 92nd Cong. 2d Sess. (1971). Secretary Shultz chronicled all manners of fiduciary abuse including trustees "milk(ing)" the trusts through exhorbitant fees, loans, or other payments, embezzlement, bribery, insurance commissions, purchases and sales through the trusts. In one example, a Teamster local contracted to purchase land to build housing which the

government found to be largely underwater and consist of primarily rock outcroppings.

Given the very extensive findings and investigations of Congress leading up to the passage of ERISA, including testimony concerning employees in the New York retail shoe industry and abuses of fiduciaries in the retail shoe business, it is inconceivable that Congress intended in ERISA to insulate the Trustees of Retail Shoe from being held accountable for their own wrongs.

It is respectfully submitted that, based on the Committee reports, the reason for preemption of state laws on the subject of fiduciary responsibilities was to establish a uniform nationwide standard for ease of enforceability and because state breach of trust rules related primarily to private testamentary and intervivos trusts rather than employee benefit trust. It is quite clear that a federal fiduciary duty standard applies to all cases whether brought in federal or state court. But the committee reports also make clear that Congress' intent is to provide the full range of legal and equitable remedies in both state and federal court.

It is quite clear that the policing of Pension plans by beneficiaries before ERISA was passed was found by Congress to be insufficient to correct fiduciary abuses.

The New York Court of Appeals held that the pre-emption provisions of ERISA governed the judicial determination of breach of fiduciary duty claims. What apparently was meant is that the federal prudent man definition and standard applies. So much is undisputed. Thus, state laws which set fiduciary standards are preempted. But, New York's Article 14 on its face obviously has nothing to do with fiduciary standards.

The Third-Party Complaint has only a tangential relationship to fiduciary standards. The essence of the Third-Party Complaint is an allocation between various parties to a law suit of proportional liability for an embezzlement. The only relation of the action to fiduciary duties is that some of the alleged wrongdoers are trustees.

The conclusion is overwhelming that the enforcement and preemption provisions of ERISA are designed to remedy and prevent wrongdoing by administrators and trustees such as occurred here. The Third-Party Action furthers that purpose.

The fiduciary duty standard set forth in ERISA, which is conceivably applicable to the Trustees herein, is set forth in ERISA § 414, 29 U.S.C. 404 which states in part:

> "Sec. 404(a)(d) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan . . .
>
> (B) with the case, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with aims.

The Conference Report states in part:

> The conferences expect that the courts will interpret this prudent man rule . . . bearing in mind the special nature and purpose of employee benefit plans.

The Conference Report on Section 502 of ERISA states in part:

> "The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility . . . However, with respect to suits which do not involve application of title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State Court are to be regarded as arising under the laws of the United States in similar fashion to there brought under section 301 of the Labor-Management Relations Act of 1947."

Moreover, this issue of fiduciary standards under the Retail Shoe employee benefit plan is raised by the Plaintiff's Complaint and not by the Third-Party Complaint brought pursuant to CPLR Article 14. The Plaintiff's Complaint alleged that the

Administrator of an employee benefit plan breached his duties as a fiduciary by stealing and that the administrator's conduct was expressly prohibited by ERISA. ERISA 406(b)(1), 29 U.S.C. 1106(b)(1). Thus, as a threshold element of their case, the Plaintiffs must prove that the Administrator violated his fiduciary duties to the Fund. And the standard to be applied post January 1, 1975 is supplied by ERISA. ERISA 514(a), 29 U.S.C. § 1144(a).

For the period before September 1, 1975, the Plaintiffs must also prove as an element of their prima facie case their own freedom from contributory negligence. *Binder* v. *Supermarkets Gen. Corp.*, 49 App. Div. 562, 370 N.Y.S.2d 184 (2d Dept. 1979)(comparative negligence doctrine applies to causes of action accruing prior to September 1, 1975 even if action is commenced subsequent to September 1, 1975); *Bacon* v. *Celeste*, 30 App. Div.2d 324 (1st Dept. 1968); *Craig* v. *Anyon*, 212 App. Div. 55, 208 N.Y.S. 259 (1st Dept. 1925); *aff'd*, 242 N.Y. 569 (1926); Prosser, *The Law of Torts*, 65 at 416-17 (4th ed. 1971) (under doctrine of contributory negligence, the slightest negligence on the part of Plaintiff will bar recovery; proving the absence of his own negligence is a substantive part of the Plaintiff's right to recover).

After September 1, 1975, the Petitioner must prove the Plaintiff's contributory negligence and fault as an affirmative defense. Again, ERISA supplies the standard. ERISA, § 514(a), 29 U.S.C. § 1144(a).

Furthermore, as the reasoned dissent of Judge Kaye pointed out:

> "Appellants have not sought to strike respondents' affirmative defense, which thus remains part of the action, raising the very issues this Court concludes are beyond the jurisdiction of the state court."

Under the affirmative defense of contributory fault, the trier of fact would have to determine the same issue raised in the Third-Party Complaint of whether the Trustees breached their fiduciary duties. The logical conclusion of the Court's reasoning is that the

liability of a negligent Defendant will have progressed from; a) no liability in the event the Plaintiff's is contributorily negligent to; b) liability for Defendant's proportionate culpable conduct to; c) complete and total liability irrespective of the greater fault and culpability of the Plaintiff.

Therefore, the Third-Party Complaint does not introduce any issue involving any breach of fiduciary duty by an employee benefit plan not already raised by the Complaint and Answer.

CONCLUSION

The petition should be granted and the Opinion and decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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August 15, 1984

APPENDIX

OPINION AND ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

No. 203

RETAIL SHOE HEALTH COMMISSION,
Plaintiff.

and

JACK MALTZ, *et al.*,
Appellants,

v.

CHARLES G. REMINICK, *et al.*,
Respondents.

(and a third-party action.)

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(203) Arthur D. Felsenfeld & Martin I. Shelton, NY City, for appellant on counterclaim.

Andrew R. Simmonds, Robert E. Meshel & William M. Reid, NY City, for third-party plaintiff/respondents.

Dorit S. Heimer, NY City, for third-party defendant/respondent.

JONES, J.

The preemptive provisions of ERISA govern the judicial determination of breach of fiduciary duty claims against the trustees of an employee welfare benefit plan within the embrace of that Act and preclude actions in state courts for the enforcement of such

claims. Accordingly, where such a plan has brought an action in our State courts against its accountants and consultants for their alleged failure to detect and report substantial misappropriations by the administrator of the plan, our courts are foreclosed from entertaining claims over by the accountants and consultants against the individual trustees of the plan for contribution or indemnity based on allegations that breach of their fiduciary duties by the trustees contributed to the losses sustained by the plan.

In the initial action, Retail Shoe Health Commission, a collectively bargained, multi-employer, jointly administered Welfare Fund, and the individual trustees of the Fund sought to impose liability on Reminick, Aarons & Company, a partnership, and its individual partners on the theory that as public accountants and auditors of the Fund they had failed and neglected to detect and report the misappropriation by Jerome Simon, the administrator of the Fund, of some $765,000 of Fund assets. Reminick then served a third party complaint against the trustees individually and Tolley International Corporation (which had been engaged by the Fund to provide actuarial and consulting services), seeking judgment over by way of contribution or indemnity or both. Tolley thereupon served counterclaims against Reminick, the Fund and the trustees individually as well as a cross claim against the trustees individually, all similarly seeking contribution or indemnification or both.

The individual trustees moved to dismiss the third party complaint of Reminick and the counterclaim and cross claim of Toiley on the ground that the court lacked subject matter jurisdiction of the claims and that Tolley lacked standing to sue. The theory of the motion to dismiss was that the various claims against the individual trustees were governed and controlled by the provisions of the employee Retirement Income Security Act of 1974 (ERISA) and that dismissal was mandated to give effect to the resulting federal preemption.

Supreme Court denied the motion to dismiss, holding that ERISA does not preempt state law when a vital state interest is

involved and is tengential to the employee benefit plan and that the stated causes of action for contribution and indemnification came within such exception. The Appellate Division affirmed without opinion and granted the individual trustees lease to appeal to our Court on a certified question. We reverse.

Inasmuch as it is undisputed that the Fund is an employee welfare benefit plan within the embrace of ERISA (ERISA § 3[1]; 29 USC § 1002[1]), resolution of the issues posed on this appeal turns on the effect the provisions of ERISA have on the claims here sought to be dismissed.

We start with the ineluctable premise that the federal law preempts state regulation of ERISA employee benefit plans. The Act provides expressly that its provisions shall supersede all state laws insofar as they may relate to any employee benefit plan within its embrace.[1] The individual trustees are fiduciaries within the meaning of subdivision 21 of section 3 of ERISA (29 USC § 1002[2]), and the gravamen of the claims of both Reminick and Tolley against them is breach of fiduciary duties (i.e., that the trustees should have known of the embezzlements and defalcations of Simon, that they permitted and condoned his misconduct, that by acts of omission and commission they participated in that misconduct, that they breached their obligation to report such misconduct, and in general that they are liable in consequence of breaches of duty, want of due care, and other fault). As a matter of substantive law, the nature and scope of the duties and liability of the trustees in this regard are determinable under the provisions of ERISA (e.g. ERISA §§ 404, 405; 29 USC §§ 1104, 1105, 1109). It is substantive claims of just this character that fall squarely within the scope and thus the preemption of ERISA.

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[1] ERISA § 514(a), 29 USC § 1144(a), provides in pertinent part:

"(a) * * * [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan * * *

(c) For purposes of this section:

(1) the term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State * * *."

The question then arises as to whether these claims may be asserted in a state court action such as the present. Here again, it is the provisions of ERISA which are determinative. Subdivision (e) of section 502 of ERISA (29 USC § 1132[e])[2] provides that the district courts of the United States shall have exclusive jurisdiction over civil actions arising under ERISA (with an exception not now pertinent). Accordingly, we are obliged to conclude that the present claims asserted by Reminick and Tolley against the trustees may not be entertained in our State courts.

Reminick and Tolley argue that because they do not come within the literal terms of ERISA, § 502(a)[3] which lists the

[2] This provision reads as follows:

"(e)(1) Except for actions under subsection (a)(1)(B) of this section [actions by a participant or beneficiary to recover benefits or to enforce rights under the plan, see fn. 3, *infra*], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."

[3] ERISA § 502(a), 29 USC § 1132(a), provides in relevant part:

"Persons empowered to being civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for an appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other

persons empowered to being a civil action under the Act, the congress cannot have intended that ERISA would preclude their claims. This argument is wide of the mark. Inasmuch as ERISA preempts all claims based on alleged breach of fiduciary duty on the part of ERISA trustees and vests jurisdiction for their enforcement exclusively in the federal courts, the circumstance that persons in the outboard position of Reminick and Tolley may have no statutory standing to bring such an action under the federal regulatory scheme is merely an aspect of that scheme. If there is a deficiency or inequity in the scope of section 502(a), it is attributable to the Act itself and any petition for remedy or correction must be addressed to the Congress.

The same response must be made to the arguments of Reminick and Tolley that they are entitled to assert their claims for contribution and indemnity under state law (e.g., CPLR, article 14; *Dole* v. *Dow Chemical Co.*, 30 NY2d 143) in our State courts. The state laws in this regard, too, have been superseded and the claims preempted under ERISA (cf. *Michota* v. *Anheuser-Busch, Inc.*, Nos. 76-193, 77-2543 [D.N.J., decided October 7, 1983, unpublished opinion])

Finally, Tolley argues that there should at least be no dismissal of its claims against the individual trustees to the extent that they arise out of transactions which took place prior to January 1, 1975, the effective date of ERISA. It is accurate to say, of course, that ERISA peemption does not apply with respect to any act or omission which occurred prior to that date (ERISA § 514 [b][1], 29 USC § 1144 [b][1]). Tolley did not, however, (nor did the Fund and the individual trustees in the initial action) plead claims based on pre-1975 transactions separately or seek discrete relief with respect thereto; Tolley's pleading of all claims is lumped in a single cause of action which must stand or, in this instance, fall as a unit. Nevertheless, our dismissal of Tolley's

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appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title * * *."

pleadings now before us is without prejudice to the right of Tolley, if it be so advised, to apply at Supreme court for leave to replead to state separately claims it would assert based on acts and omissions that occurred prior to January 1, 1975.

For the foregoing reasons the order of the Appellate Division should be reversed, with costs, the motion of the individual trustees granted, and the counterclaim, the cross claims, and the third party complaint against them dismissed, without prejudice to the right of Tolley to apply for leave to replead as indicated.

Retail Shoe Health Comm v Reminick

No. 203

KAYE, J. (dissenting)

This case centers on the misappropriation of approximately $675,000 from the Retail Shoe Health Commission (the Fund), an employee welfare benefit plan, by its former administrator, Jerome Simon. The Fund and its individual trustees brought suit in state court against the Fund's former accountants on three theories: first, that the accountants breached their contract to audit the Fund's books and records enabling Simon to divert the funds; second, that the accountants were negligent, resulting in the loss; and third, that they "are obligated to indemnify plaintiffs for their loss." Respondents' affirmative defense[4], cross-claim, counterclaim and third-party claim allege that the trustees themselves failed in their own fiduciary responsibilities to the Fund, which caused or contributed to the loss. By these allegations they seek no affirmative recovery, but only to apportion liability for Simon's tortious conduct among the parties to this action, all of whom allegedly shared responsibility for monitoring the operation of the Fund. The pleadings assert common law claims, and do not mention ERISA.

Assuming the truth of respondent's allegations, as we must on this motion to dismiss, the result reached by the Court allows the

[4] Appellants have not sought to strike respondents' affirmative defense, which thus remains part of the action, raising the very issues this Court concludes are beyond the jurisdiction of the state court.

trustees to escape responsibility for losses due in whole or in part to their own derelictions, and leaves respondents with a potential massive liability and no effective remedy against plaintiffs who are also wrongdoers. I do not belive that ERISA requires this unpalatable result, and therefore would affirm the order below.

ERISA allows a civil action to be brought by the Secretary of Labor or a participant, beneficiary or fiduciary (29 USC § 1132(a)), and in such actions it provides for exclusive federal jurisdiction:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participanta, beneficiary or fiduciary (29 USC § 1132(e)(1)).

A pivotal assumption underlying the majority's holding is that respondents' claims are barred because they are not within the classes of persons authorized to bring a civil action under ERISA. But a claim for relief is not necessarily pre-empted or extinguished because the initiating party falls outside the enumerated categories of section 1132(a). (See *Franchise Tax Bd* v *Construction Laborers Vacation Trust*, ____ US ____, 103 S Ct 2841.)

Nor is the provision for exclusive federal jurisdiction a bar to entertaining respondents' claims. First, that provision applies, by its own terms, only to actions brought by the enumerated persons, which do not include respondents. Second, it is well established that even where statutes pre-empt state law and provide for exclusive federal jurisdiction state courts may, applying federal law, decide issues necessary to the resolution of state causes of action (*Hathorn* v *Lovorn*, 457 US 255, 266 & n. 18; *Pan Am Co.* v *Superior Court*, 366 US 656, 664-65). Though the exclusive jurisdiction provision of ERISA might prohibit the commencement of a state court action seeking affirmative relief against the trustees for their derelictions as trustees, it still would not prevent the state court from considering such questions when they are part and parcel of defenses to a cause of action premised

on state law. (See, e.g., *Weiner* v *Shearson*, 521, F2d 817; *Shareholders Mgmt Co.* v *Gregory*, 449 F2d 326; *Birenbaum* v *Bache & Co.*, 555 SW2d 513 [Tex App]). The same rationale should apply here. Sustaining respondents' claims against the trustees would not alter substantive rights created by ERISA or disturb any allocation of responsibility among employers subject to ERISA (*Michota* v *Anheuser-Busch, Inc.*, Nos. 76-193, 77-2543 [D. N.J., decided October 7, 1983, unpublished opinion]), but would simply allow respondents to maintain apportionment claims in one action, as is common in tort cases in the state courts.

Since the result reached by the courts below complied with the state law and transgressed no overriding federal interest, I vote to affirm.

* * * * * *

Order reversed, with costs, motion of the individual trustees granted, and the counterclaim, cross claims and third party complaint against them dismissed, without prejudice to the right of Tolley International Corporation to apply for leave to replead as indicated in the opinion herein. Question certified answered in the negative.

Opinion by Judge Jones in which Judges Jasen, Meyer and Simons concur. Judge Kaye dissents and votes to affirm in an opinion in which Chief Judge Cooke and Judge Wachtler concur.

Decided May 17, 1984

ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 12, 1983.

Present—HON. JOSEPH P. SULLIVAN, *Justice Presiding*
DAVID ROSS
MAX BLOOM
ARNOLD L. FEIN
FRITZ W. ALEXANDER, II, *Justices*

RETAIL SHOE HEALTH COMMISSION,
Plaintiff,

and JACK MALTZ, ALFRED WACHTEL, JULES ARONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION,
Plaintiffs-Appellants,

—against—

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,
Defendants.

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,
Third-Party Plaintiffs-Respondents,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES AARONSON, MELVIN KRAUSS and JOSEPTH BINEBAUM,
Third-Party Defendants-Appellants,

and TOLLEY INTERNATIONAL CORPORATION,
Third-Party Defendant-Respondent,

and THE ESTATE OF HAROLD JACOBSON and BASIL CASTOVINCI ASSOCIATES, INC.,
Third-Party Defendants.

An appeal having been taken to this Court by the plaintiffs-appellants and third-party defendants-appellants from the order of the Supreme Court, New York County (Maresca, J.), entered on February 24, 1982, which denied their motion to dismiss the third-party complaint and the cross-claim and counterclaim.

And said appeal having been argued by Arthur D. Felsenfeld, of counsel for the appellants, by Dorit S. Heimer, of counsel for third-party defendant-respondent, and by Michael P. Weiner, of counsel for third-party plaintiffs-respondents; and due deliberation having been had thereon.

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondents shall recover of appellants one bill of $75 costs and disbursements of this appeal.

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SUPREME COURT—NEW YORK COUNTY SPECIAL TERM—PART 1

Index No. 15430/80
#129 of 10/14/81

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of Retail Shoe Health Commission,

Plaintiffs,

—against—

CHARLES G. REMINICK, HERBERT, M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Defendants.

CHARLES G. REMINICK, HERERT, M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Third-Party Plaintiffs,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON MELVIN KRAUSS, THE ESTATE OF HAROLD JACOBSON, JOSEPH BINENBAUM, TOLLEY INTERNATIONAL CORPORATION, and BASIL CASTOVINCI ASSOCIATES, INC.,

Third-Party Defendants.

MARESCA, J.:

The issue presented in this motion for dismissal of the third-party complaint, counterclaim and cross-claim is whether the third-party plaintiffs are precluded from pleading cause of action for contribution and/or indemnification of CPLR Article 14

under the pre-emptive provisions of ERISA. (U.S. Code Tit. 29). The statutory right of contribution under CPLR Article 14 is neither in conflict with nor pre-empted by provisions of ERISA. Therefore, the court has subject matter jurisdiction over the third-party complaint and cross-claims.

I

This action arises in connection with defalcations by the deceased Jerome Simon former Administrator of the Retail Health Commission (The Fund), from the fund during the period 1972 through 1979. The fund is an "employee welfare benefit plan" within the meaning of § 3 of ERISA, 29 U.S.C. § 1002(1). The defalcations, discovered in December, 1979, were accomplished primarily by Simon's preparation of duplicate vouchers with respect to claims submitted by Fund beneficiaries.

The firm of Reminick, Aarons & Co. (third-party plaintiffs Reminick) served as certified public accountants for the fund from 1972 to March, 1980, and also served as Simon's personal accountants.

The fund, by its trustees (the plaintiff's herein) seek damages against defendants and third-party plaintiffs Reminick for breach of their agreement as accountants; as well as for failing to properly perform their duties whereby Simon was permitted to continue to manage the fund and, as a result, the fund sustained damages. The trustees charge Reminick with liability for damages and seek indemnification for the loss to the fund.

Reminick filed a third-party complaint claiming entitlement to indemnity and/or contribution from the trustees and Tolley and Basil Castrovinci Associates. In substance Reminick alleges that any damages to the fund were caused by the fraud, negligence and breach of duty of Tolley (constitutes to the fund during the period 1972 to 1977) and Castrovinci (consultants to the fund during the period 1978 to present).

Tolley counterclaimed and cross-claimed against the trustees and Reminick for contribution and/or for their indemnification for their respective alleged breach of duty and negligence.

The trustees in the instant motion seek dismissal of the third-party complaint, counterclaim and cross-claim on the theory that the court lacks subject matter jurisdiction and the parties lack standing to sue. (CPLR 3211 [a] [2] [3] [7]).

II

The trustees rely on two separate sections of ERISA for the proposition that this court lacks subject matter jurisdiction of the third-party complaint, counterclaim and cross-claim and that Reminick and Tolley lack standing to sue. It is first argued that ERISA generally pre-empts all state statutes which affect the regulation of pension plans.

ERIISA § 514 (a), 29 U.S.C. § 1144(a) provides in part:

> "(a) . . . [T]he provisions of this subchapter and subchapter III of this title shall supercede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan . . .
>
> (c) For purposes of this section:
>
> (1) The term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . ."

The trustees next argue that irrespective of the pre-emptive provisions that Reminick and Tolley lack standing to litigate their respective claims in this court. The assert neither nor Tolley fall within the narrow group of persons authorized to bring a civil action under ERISA. Persons authorized to bring a civil action under the Act are expressly set forth in ERISA § 502(a), 29 U.S.C. § 1132(a) which provides in relevant part:

"Persons empowered to being civil action

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the

plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the secretary, or by a participant, beneficiary or fiduciary for an appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title . . ."

III

Reminick and Tolley argue that the trustees' pre-emption argument must fail for several reasons. First, the action is based in part on acts or omissions which occurred prior to January 1, 1975, ERISA's effective date, and ERISA expressly disclaims pre-emption of such actions, ERISA § 514(a) and (b)(1), 29 U.S.C. § 1144(a) and (b)(1). Second, the claims for contribution and/or indemnity do not arise under ERISA and thus are not within the "exclusive jurisdiction" of the federal courts and so are not pre-empted by ERISA, § 502(e)(1), 29 U.S.C. § 1132(e)(1) because the claims are based on state laws which reflect significant state interests which do not directly affect ERISA—regulated plans, ERISA § 514(a), 29 U.S.C. § 1144(a).

IV

The court need not reach the issue of the retroactivity of ERISA of alleged pre-1975 breaches of fiduciary duty nor the question of standing by the trustees for reasons indicated below.

A review of Congressional intent and the myriad of case law makes it eminently clear that state regulation of ERISA pension

plans are pre-empted. (*Malone* v *White Motor Corp.*, 435 U.S. 497; *Hewlett-Packard Co.* v *Barnes*, 425 F. Supp. 1294; *Morrissey* v *Curran*, 567 F2d 546; *Marshall* v *Chase Manhattan Bank [National Association]* 558 F2d 680; *Guthrie* v *Dow Chemical Co.*, 445 F. Supp. 311; *Cate* v *& Blue Shield of Alabama*, 434 F. Supp. 1187; *Bell* v *Employee Security Benefit Association*, 437 F. Supp. 382). The purpose of the pre-emption provision was to insure that ERISA plans were uniformly governed by federal legislation and not subject to various state regulations and/or interpretations.

A closer analysis of the purposes of ERISA's pre-emption shows that a state statute will be pre-empted only when it tends to invade an aspect of the regulation of pension funds that is governed by ERISA. The regulation will not be pre-empted when a vital state interest is involved and such interest is tangential to an employee benefit plan. (see: *Cornell Mfg.* v *Mushlin*, 70 AD2d 123; *Providence* v *Valley Clerks Trust Fund*, 509 F. Supp. 388).

Thus courts have permitted actions involving recovery of money judgments (*National Bank* v *Elec. Workers*, 69 AD2d 679) from pension plans; and recovery in domestic relation actions (*Stone* v *Stone*, 450 F. Supp. 919).

The cause of actions involved here are for contribution and/or indemnification. New York has maintained that the right to seek recovery among joint tortfeasors is of significant interest to insure fairness in enforcement of judgments. Further Article 14's purpose is for protection of joint tortfeasors and in no way is involved with the regulation of ERISA plans. As such, Reminick and Tolley's actions are tangential in nature and are not pre-empted under ERISA. The state interest is tantamount here, for if we were to follow plaintiff's reasoning Reminick and Tolley would be faced with the risk of total liability whether or not they were found to be totally liable.

Accordingly, the motion is denied.

Dated: February 17, 1982